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ONG YEW TEIK v. YEE TECK FAH

COURT OF APPEAL, PUTRAJAYA
MARIANA YAHYA JCA
HASHIM HAMZAH JCA
ISMAIL BRAHIM JCA
B [CIVIL APPEAL NO: W-02(A)-424-03-2022]
4 SEPTEMBER 2025

Abstract – *(i) At the time of the filing of an originating summons, failure to obtain the prior sanction from the Director General of Insolvency goes to the issue of locus standi of the appellant to commence and prosecute that claim; (ii) The fact that a preliminary objection has been canvassed before the High Court and the originating summons is dismissed on the merits does not mean that the preliminary objection could not be raised again in the present appeal, as the failure to comply with the provisions went to the standing of the appellant to bring the originating summons before the courts.*

CIVIL PROCEDURE: *Proceedings – Appeal – Preliminary objection – Whether preliminary objection canvassed before High Court – Whether could be raised again in appeal stage – Inclusion of impugned documents in record of appeal – Whether basis for dismissing appeal – Whether there was failure to obtain sanction of Director General of Insolvency at time of filing of originating summons*

The appellant, founder and shareholder of Euroceramic Technologies Company Limited ('ECT'), transferred his shares in ECT to one Dato Kamal ('Kamal') through a tripartite agreement. It was contended that Kamal acknowledged a debt of RM8,018,225 to the appellant for this transfer, which he subsequently failed to pay. The appellant commenced a civil suit against Kamal to recover the debt. The respondent, a practising advocate and solicitor, was appointed by Kamal to defend and counterclaim against the appellant in Suit 1333. During Suit 1333, the respondent drafted affidavits for the deponents, former employees and shareholders of ECT. The appellant, in referring to these affidavits as 'false affidavits', contended that the respondents admitted to the Disciplinary Committee ('DC') that he did not interview the deponents and relied on Kamal to verify the contents and arrange for affirmation. The deponents later stated that they were pressured by Kamal to sign the documents without full awareness of or explanation of the contents. The appellant and the deponents lodged a complaint with the Advocates and Solicitors Disciplinary Board ('DB') against the respondent. The complaint related to various acts of misconduct, including the drafting and use of false affidavits, fabrication of evidence and alleged misappropriation of money. The DC heard the complaint and found that

most of the appellant's complaints were time-barred under r. 6 of the Legal Profession (Disciplinary Proceedings) Rules 2017, except for those relating to the respondent's conduct during the December 2015 trial. The appellant filed an originating summons ('OS') in the High Court, which was dismissed. Hence, this appeal by the appellant. The respondent raised preliminary objections that (i) the appellant had improperly included expunged affidavits; and (ii) the appellant at the time of the filing of the OS had failed to obtain prior sanction from the Director General of Insolvency ('DGI'). The appellant, however, argued that the second preliminary objection was already addressed before the High Court and the High Court Judge ('HCJ') nonetheless proceeded to dispose of the OS based on the substantive issues in the OS.

Held (dismissing appeal)
Per Ismail Brahim JCA delivering the judgment of the court:

(1) The inclusion of the impugned documents in the record of appeal alone could not be the basis for dismissing the appeal without hearing the substantive arguments in the present appeal. This court did not propose to dwell on the first preliminary objection. (para 26)

(2a) For the second preliminary objection, although it had been raised at the High Court, the HCJ did not address this issue because the matter ought to be decided based on the merits of the matter and not on technicalities. The failure to obtain the sanction at the time of the filing the OS went to the issue of *locus standi* of the appellant to commence and prosecute that claim. (para 29)

(2b) The fact that the preliminary objections were canvassed before the High Court and the OS was dismissed on the merits did not mean that the preliminary objections could not be raised again in the present appeal, as the failure to comply with the provisions went to the standing of the appellant to bring the OS before the court below and also the present appeal. (para 33)

Case(s) referred to:
Chua Choong Yin v. Tan Boon Bak Trading Sdn Bhd & Anor [2002] 3 CLJ 357 CA ***(refd)***
Lai King Lung & Anor v. Merais Sdn Bhd [2020] 9 CLJ 449 FC ***(refd)***
Low Cheng Soon v. TA Securities Sdn Bhd [2003] 1 CLJ 309 CA ***(refd)***
Perwira Affin Bank Bhd v. Sardar Mohd Roshan Khan & Another Appeal [2009] 4 CLJ 34 CA ***(refd)***

Legislation referred to:
Insolvency Act 1967, s. 38(1)(a)
Legal Profession (Disciplinary Proceedings) Rules 2017, r. 6
Legal Profession Act 1976, s. 103D
Rules of the Court of Appeal 1994, r. 18(4)(c), (6)

A *For the appellant - Raymond Mah Mun Kitt, Agalya J Munusamy & Carolyn Ng; M/s Mah Weng Kwai & Assocs*
For the respondent - Yee Teck Fah & Yee Mi Kenn; M/s Yee Teck Fah & Co

[Editor's note: For the High Court judgment, please see Ong Yew Teik v. Yee Teck Fah [2022] CLJU 3065; [2022] 1 LNS 3065 (affirmed).]

B *Reported by Suhainah Wahiduddin*

JUDGMENT

Ismail Brahim JCA:

C **Grounds Of Decision**

[1] This is an appeal against the whole of the decision of the High Court given on 20 January 2022 dismissing the amended originating summons (encl. 103) dated 7 September 2020 with costs of RM5,000.

D **[2]** Enclosure 103 ("OS") was the appellant's appeal to the High Court against the whole of the decision of the Advocates and Solicitors Disciplinary Board ("DB") given on 18 July 2020 under s. 103D of the Legal Profession Act 1976 ("LPA") dismissing the appellant's Complaint No. DC/16/0938.

E **[3]** After hearing the oral submissions of the parties and considering the written submissions and the ROA, we dismissed the present appeal primarily on the second point of preliminary objection raised by the respondent which we will refer to later in this judgment.

The Background Facts

F **[4]** To appreciate the facts that led to the present appeal it is necessary to set out the actions that led to the OS in the High Court which resulted in the present appeal.

Initial Dispute And High Court Suit (Suit 1333)

[5] The appellant, Ong Yew Teik, was the founder and shareholder of G Euroceramic Technologies Company Limited ("ECT").

[6] In November 2006, the appellant transferred his shares in ECT to Dato' Kamal YP Tan ("Kamal") through a tripartite agreement. It was contended that Kamal acknowledged a debt of RM8,018,225 to the appellant for this transfer, which was due by 31 March 2007.

H **[7]** Kamal subsequently failed to pay this sum.

[8] Consequently, on 19 November 2007, the appellant commenced Kuala Lumpur High Court Civil Suit No. S5-22-1333-2007 ("Suit 1333") against Kamal to recover the debt.

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[9] The respondent, Yee Teck Fah, a practising advocate and solicitor at Yee Teck Fah & Co, was appointed by Dato' Kamal to defend and counterclaim against the appellant in Suit 1333. It is important to note that no solicitor-client relationship existed between the respondent and the appellant.

[10] During Suit 1333, the respondent drafted affidavits for Kong Ah Choo, Edward Mosses Julius Josephath, and Law Swee Haw (collectively, "deponents"), who were former employees and shareholders of ECT. These affidavits, affirmed on 12 February 2008, stated that the appellant was not a shareholder of ECT. The appellant refers to these as "false affidavits".

[11] The appellant alleges that the respondent drafted these affidavits based solely on Kamal's instructions, despite having contradictory documents like statutory declarations and a shareholder agreement from 2006. The appellant further claims the respondent drafted and filed these affidavits without directly communicating with the deponents, explaining the contents, verifying their truthfulness, or allowing them to read the contents.

[12] It was further contended that the respondent admitted to the Disciplinary Committee ("DC") that he did not interview the deponents and relied on Kamal to verify the contents and arrange for affirmation. The deponents later stated they were pressured by Kamal to sign the documents without full awareness of or explanation of the contents.

[13] On 11 August 2016, the High Court in Suit 1333 dismissed the appellant's claim and allowed Kamal's counterclaim.

Appeals In Suit 1333

[14] The appellant appealed the High Court's decision in Suit 1333 to the Court of Appeal (Civil Appeal No. W-02(W)-1694-09-2016).

[15] On 19 January 2019, the Court of Appeal, by a majority decision, allowed the appellant's appeal, setting aside the High Court's decision.

[16] Kamal's subsequent applications for leave to appeal and a stay of execution to the Federal Court were dismissed in July 2019, and a review application was also dismissed on 23 November 2020.

Complaint To The Advocates And Solicitors Disciplinary Board (DB)

[17] On 7 December 2016, the appellant and the deponents lodged Complaint No. DC/16/0938 with the Advocates and Solicitors Disciplinary Board ("DB") against the respondent.

[18] The complaint related to various acts of misconduct, including the drafting and use of false affidavits, fabrication of evidence, and alleged misappropriation of money.

[19] On 26 April 2019, the Disciplinary Committee ("DC") heard the complaint. The DC found that most of the appellant's complaints were time-barred under r. 6 of the Legal Profession (Disciplinary Proceedings) Rules 2017 ("LPDPR 2017"), except for those relating to the respondent's conduct during the December 2015 trial. Following the above, the appellant filed the OS in the High Court, which was dismissed by the High Court.

Our Decision

[20] In the present appeal after considering the submissions of the parties, we are of the view that the present appeal could be disposed of based primarily on the second preliminary objection.

Preliminary Objections In The Present Appeal

[21] The respondent raised two preliminary objections in the present appeal. Based on these objections, it was submitted that the present appeal was not properly brought before the court and should be dismissed.

First Preliminary Objection

[22] The first preliminary objection concerns the inclusion of expunged affidavits. The respondent contends that the appellant improperly included two affidavits, affirmed on 8 October 2021 and 1 November 2021 (referred to as "impugned documents"), in the record of appeal. It was pointed out that the learned High Court Judge had expressly ordered these documents to be expunged from the record of the High Court proceedings on 20 January 2022. As these impugned documents were neither read nor put into evidence in the High Court proceedings, it was submitted that they do not fall within the scope of documents permissible under r. 18(4)(c) of the Rules of the Court of Appeal 1994.

[23] It was also pointed out that the respondent's solicitors had promptly objected to the inclusion of these documents in the record of appeal. Despite this objection and explicit directions from both the Deputy Registrar of the Court of Appeal and the Deputy Registrar of the High Court, the appellant refused and/or neglected to comply with the order to remove these documents and insisted on their inclusion.

[24] In the circumstances the respondent argues that such actions demonstrate a disregard for court orders and rules, particularly rr. 18(4)(c) and r. 18(6) of the Rules of the Court of Appeal 1994, and therefore, the appeal should be dismissed as being not properly brought. In support, the respondent cited the following cases:

(i) *Chua Choong Yin v. Tan Boon Bak Trading Sdn Bhd & Anor* [2002] 3 CLJ 357; [2002] 4 MLJ 145: In this case, the Court of Appeal upheld a preliminary objection based on r. 18(6) of the Rules of the Court of Appeal 1994. The court found that the appeal was not properly brought

before the court because the appellant had shown "utter disregard" for a court order by including prohibited exhibits in the appeal records, which was a clear breach of r. 18(4)(c) of the Rules; and

(ii) *Low Cheng Soon v. TA Securities Sdn Bhd* [2003] 1 CLJ 309; [2003] 1 MLJ 389: This case followed *Chua Choong Yin* and reiterated that the "importance of the Rules of Court cannot be ignored" as they are crucial for the administration of justice.

[25] The Court of Appeal upheld the preliminary objection in that case where a "huge chunk of exhibits had been left out of the record of appeal" due to non-compliance, and the appellant showed "blatant disregard for the Rules" by not responding to objections or attempting to file a supplementary record. The court concluded that the appeal was "not properly brought before us".

[26] We have considered the first preliminary objection above; however, we are of the view that the inclusion of the impugned documents in the ROA alone could not be the basis for dismissing the appeal without hearing the substantive arguments in the present appeal. We therefore do not propose to dwell on the first preliminary objection but instead will explain why we find that there are merits to the second preliminary objection which goes to the competency of the appeal itself. Our decision to dismiss the appeal was based on the second preliminary objection.

Second Preliminary Objection

[27] The second preliminary objection raised by the respondent relates to the issue that the appellant at the time of filing the OS had failed to obtain prior sanction from the Director General of Insolvency ("DGI"). This fact was undisputed. However, it is to be observed that the appellant did eventually obtain the DGI's sanction, but this was 35 days after the OS had already been filed.

[28] The respondent emphasises that s. 38(1)(a) of the Insolvency Act 1967 requires prior sanction for an undischarged bankrupt to institute a claim, file a counterclaim, defend an action, or file an appeal. It was further submitted that subsequent sanction is insufficient to validate an action that was initiated without the necessary legal capacity at the time of filing. Therefore, the appellant lacked *locus standi* to bring an action when the OS was filed, rendering the OS void and of no legal effect. Consequently, the present appeal suffers the same fate.

[29] The appellant in response to this argument took the position that this issue was already addressed before the learned High Court Judge and that the learned High Court Judge nonetheless proceeded to dispose of the OS based on the substantive issues in the OS. We noted that from the grounds of

decision of the learned High Court Judge, although this objection was raised the learned High Court Judge did not address this issue as Her Ladyship was of the view that the matter ought to be decided based on the merits of the matter and not on technicalities. On this issue we take the view that the failure to obtain the sanction at the time of filing the OS goes to the issue of *locus standi* of the appellant to commence and prosecute that claim.

[30] Before addressing this issue, it is necessary for us to refer to the case of *Lai King Lung & Anor v. Merais Sdn Bhd* [2020] 9 CLJ 449; [2018] 2 MLJ 537, which explained the principles underlying the requirement for sanction as follows:

> [17] In the case of an undischarged bankrupt, the sanction of the Director General of Insolvency ('DGI') is required in order for the bankrupt to maintain any action or proceeding (other than an action for damages in personal injury claims) – s. 38(1)(a) of the Insolvency Act 1967. This rule restricting the conduct of an undischarged bankrupt is meant for the protection of his creditors' interests and those dealing with him so as to maintain the commercial morality of his dealings. The underlying rationale for a bankrupt's disabilities and disqualifications was expressed in the following manner in *Khoo's Law and Practice of Bankruptcy in Malaysia* (2nd Ed) at p 1: "When a person becomes a bankrupt, he obtains protection from legal proceedings by his creditors subject to certain exceptions. However, he is subject to certain disabilities and disqualifications primarily aimed at preventing him from incurring further debts ... The objective of the bankruptcy process is that, since the debtor is unable to satisfy all his debts, his assets should be shared fairly and equitably among his creditors ..."

[31] In *Perwira Affin Bank Bhd v. Sardar Mohd Roshan Khan & Another Appeal* [2009] 4 CLJ 34; [2009] 4 MLJ 201, the Court of Appeal in its judgment delivered by His Lordship Low Hop Bing JCA stated as follows:

> Section 38(1)(a) sets out the incompetence of an undischarged bankrupt to maintain an action in the following words:
>
> (1) Where a bankrupt has not obtained his discharge -
>
> (a) the bankrupt shall be incompetent to maintain any action (other than an action for damages in respect of an injury to his person) without the previous sanction of the Director General of Insolvency.
>
> We find it pertinent to set out the principles enunciated by the courts in considering s. 38(1)(a), as follows:
>
> (1) The word 'action', which has not been defined in the Act, must be given its plain meaning, *ie*, civil action or civil proceedings in court: per Augustine Paul JC (now FCJ) in *Chua Tin Hong Re; Ex parte Castrol (M) Sdn Bhd* [1996] MLJU 608; [1997] 2 AMR 1253, at p 1260 (AMR) (HC), which in turn referred to *R v. Kappaya* [1935] MLJ 237;

(2) Such civil action or proceedings include:

(a) the filing of a notice of appeal: *Amos William Dawe v. Development & Commercial Bank (Ltd) Bhd* [1981] 1 MLJ 230, at pp. 231-232 (FC); *Re Low Kok Tuan Ex p Arab-Malaysian Merchant Bank Bhd* [1996] MLJU 442; [1997] 4 CLJ 185, at p. 189E (HC); and *Bathamani a/p Suppiah v. Southern Finance Co Bhd* [2000] 6 MLJ 427, at p. 430E (HC);

(b) an application for stay of the bankruptcy proceedings: *Re Lai Hee Sang Ex p Asia Commercial Finance (M) Bhd* [2000] MLJU 476; [2000] 7 CLJ 302, at p. 304;

(c) an application to set aside a default judgment upon which the bankruptcy proceedings are founded: *Sabah Bank Bhd v. Syarikat Bintang Tengah Sdn Bhd* [1992] 2 MLJ 588, at p. 590, (HC); *Supreme Finance (M) Bhd v. Mohamad Noor (t/a Everway Food Centre) & Ors* [1993] 2 MLJ 29, at p 33 (HC); and *Re Mat Sari bin Hamid, ex p United Asian Bank Bhd* [1993] 1 CLJ 202, at p 203, (HC);

(d) a counterclaim: *Goh Eng Hwa v. M/s Laksamana Realty Sdn Bhd* [2004] 3 MLJ 97, at p. 113 (CA); (See also *Khoo Kay Ping's Law and Practice of Bankruptcy in Malaysia* (2nd Ed) at p 216);

(3)(a) The word 'maintain' does not mean that a bankrupt cannot keep alive any action without the previous sanction of the DGI; the bankrupt is not required to withdraw that action and file afresh upon obtaining the sanction as it would work injustice on the bankrupt: *Richland Trade & Development Sdn Bhd*; and

(3)(b) The words 'maintain any action' are wide enough to cover both the bringing or continuing of an action already brought: *K Ismail Ganey Rowther and Co, first defendant v. MA Abdul Kader, the official assignee of the property of KP Peer Mohamed, A Bankrupt* [1933] MLJ 98 (CA FMS);

(4) The adjudication of a party as a bankrupt does not mean that all pending actions of that party would lapse or abate on that account, or that the bankrupted party is required to withdraw the actions pending the obtaining of sanction from the what that party could not do without such a sanction was to take any further step in the proceedings: see the majority judgment of the Singapore Court of Appeal in *Tan King Hiang v. United Engineers (Singapore) Pte Ltd* [2005] 3 SLR 529, at p 536, which considered s. 131(1)(a) of the Bankruptcy Act (Cap 20, 2000 Rev Ed) of Singapore (which is equivalent to our s. 38(1)(a);

(5) The bankrupt's solicitor could be ordered to personally pay costs for filing an originating motion for the bankrupt who was not competent to proceed with that originating motion, as this is a basic principle of law which every reasonably competent solicitor would have known: *Tan King Hiang*;

A (6) In an action based on breach of contract by the defendant (as opposed to an action in respect of an injury to the bankrupt's person), the bankrupt's estate and cause of action are vested in the DGI upon adjudication and unless the prior sanction of the DGI is obtained to maintain the action, the bankrupt is incompetent to do so in his own name or to employ an advocate and solicitor to act B on his own behalf without the sanction: *Chin Kon Nam & Anor v. Chai Yun Phin Development Sdn Bhd* [1996] 4 MLJ 271 at p 275; [1996] 1 CLJ 444 at p 446, HC; *Sabah Bank Bhd*, *Tan King Hiang*; s. 24(4); s. 48; and *Re Low Kok Tuan*;

(7) **The requirement of a sanction is not just a formality; it goes to his** C **capacity: per Abdul Hamid Mohamad FCJ (later CJ Malaysia) in *Goh Eng Hwa*, (CA)** at p. 104; and

(8) The steps taken by a bankrupt in civil action or proceedings without the previous consent of the DGI in contravention of s. 38(1)(a) are null and void: *Goh Eng Hwa*, CA; *Richland Trade & Development Sdn Bhd*, (HC); and *Christopher Tan Kok Ching v. Bolhassan bin Di* [1998] D MLJU 533; [1998] 5 CLJ 177 (HC).

We would add that the DGI's previous sanction required under s. 38(1)(a) is a statutory recognition of public interest and public policy considerations. (emphasis added)

E **[32]** In *Lai King Lung* (*supra*), the Federal Court in the said case stated as follows:

(20) … But where s. 38(1)(a) applies, an undischarged bankrupt must obtain the previous sanction of the DGI to institute a claim (*Dato' Kuah Tian Nam v. Tan Wrun Peng* [2009] 9 MLJ 464), file a counterclaim (*Goh* F *Eng Hwa v. M/s Laksamana Realty Sdn Bhd* per Abdul Hamid Mohamad FCJ, as he then was), defend an action (*Kesang Leasing Sdn Bhd v. Dato' Hj Mat @ Mat Shah bin Ahmad & Ors* [2009] 7 MLJ 305), maintain the action and continue with the case (*Priyakumary Muthucumaru & Anor v. Gunasingam a/l Ramasingam (a bankrupt)* [2006] 6 MLJ 511), 'commence an action by writ or by any of the mode provided in O. 5 r. 1' (Bankruptcy G Law in Malaysia and Singapore by GK Ganesan at p 547) *or file an appeal (Amos William Dawe v. Development & Commercial Bank (Ltd) Berhad; see also Owens v. Comlaw (No 62) Pty Ltd & Ors [2006] VSCA 151 at para [42]* …

[33] Based on the above and the fact that the preliminary objections were canvassed before the High Court and the OS was dismissed on the merits does H not mean that the preliminary objections could not be raised again in the present appeal, as the failure to comply with the provisions as stated in *Perwira* and *Lai King Lung*'s case (*supra*) goes to the standing of the appellant to bring the OS before the court below and also the present appeal. Based on these reasons, we dismissed the appeal with costs.

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